IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 226.

JOHN T. NEW, Plaintiff in Error,

vs.

THE TERRITORY OF OKLAHOMA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

Appellant was convicted of murder in the District Court of Washita County, Oklahoma. He appealed to the Supreme Court of Oklahoma, and that court affirmed the judgment and sentence to a life term in the penitentiary, at its June term, 1902.

From the judgment of affirmance he has appealed to this court.

The questions to be decided on this appeal arise exclusively from the instructions of the trial court.

Plaintiff in error contends that the trial court committed fundamental error in failing to submit to the jury the law with reference to manslaughter, and in charging the jury that it was defendant's duty to retreat from his own premises in order to avoid the necessity of killing his assailant, and in other respects, as will more fully appear in the assignments of error which are copied in the brief. All of the instructions given by the court were duly excepted to. (See printed record, p 103.)

II.

The assignments of error are as follows:

FIRST ASSIGNMENT OF ERROR.

The trial court erred in refusing to give in charge to the jury special instructions number five requested by the defendant, which refusal was at the time excepted to and which special requested instruction was as follows:

"You are instructed that if from the evidence you entertain a reasonable doubt as to the cause of the death of the deceased, that is, if you are in doubt as to whether or not he died from the effects of gun shot wounds or from the effects of injuries inflicted by a blow upon the head by some deadly instrument, then it is your duty to acquit the defendant," which said requested instruction correctly stated the rule of law applicable to the evidence in the case, and was demanded by said evidence.

SECOND ASSIGNMENT OF ERROR.

The trial court erred in failing and refusing to instruct the jury as to the law of manslaughter, and in failing and refusing to instruct the jury that the defendant might under the indictment be acquitted of murder and convicted of manslaughter, the issue of manslaughter being presented by the evidence at the trial, and prejudicial error and injury to the defendant's legal and substantial rights being committed by said trial court in ignoring and failing and refusing to present and submit to the jury said issue of manslaughter.

THIRD ASSIGNMENT OF ERROR.

The trial court erred in the nineteenth section of the instructions to the jury in charging the jury as follows:

"The jury is instructed that if from all the evidence, facts and circumstances in evidence in the case, you believe beyond a reasonable doubt that the defendant, New, could have withdrawn from the scene of the tragedy with safety, and could have gone away from the scene of action with safety to his life and person, and without committing the homicide described in evidence, as a matter of law it was his duty to have done so, and if he did not, and you further believe from the evidence beyond a reasonable doubt that the homicide was not necessary in a reasonable and necessary defense of the life or person or habitation of said New at the time of said homicide then your verdict should be guilty of mur-

der." Which said erroneous charge was by the defendant duly excepted to at the time of its being given, and which said charge was erroneous in this:

First. It placed upon the defendant the duty, when threatened and approached in a threatening manner, upon his own premises, to retreat at the approach of his adversary.

Second. It deprived the defendant of the right of acting upon the reasonable appearances of danger, viewed from his standpoint at the time, and weighed his actions by the actual danger he was then laboring under, viewed "from all the evidence, facts and circumstances in evidence" before the jury.

FOURTH ASSIGNMENT OF ERROR

The trial court erred in instructing the jury in section number fifteen and one-half of the instructions as follows:

"The court instructs the jury that if a man kills another through mere cowardice, or under circumstances which are not in the opinion of the jury sufficient to induce a reasonable and well grounded belief of danger to life or of great bodily harm, in the mind of an ordinary courageous man, the law will not justify the killing on the ground of self defense," to which instructions to the jury the defendant duly excepted at the time of its delivery to the jury by the trial court, and the giving of which instruction was prejudicial to the defendant, and was erroneous in this:

First. It does not state correctly the rule of law, and

Second. It does not explain that the defendant might be guilty of manslaughter and might be convicted of manslaughter under the evidence in the case.

FIFTH ASSIGNMENT OF ERROR.

The trial court erred in assuming as a fact that the deceased came to his death from the defendant with a Winchester rifle shooting a bullet into the body of the deceased, and in assuming as a fact that the said shooting and bullet was the cause of the death of deceased, the court in his instructions to the jury using the following language, "at the same time the fatal shot in this cause was fired by the defendant," and also in said instruction using the following language, "before the fatal shot was fired," thereby invading the province of the jury, whose duty it was, and not that of the trial judge, to determine the issue as to how the deceased came to his death, and as to whether deceased came to his death in the manner charged in the indictment.

SIXTH ASSIGNMENT OF ERROR.

The trial court committed error in refusing to give the jury as the law of the case the first special instruction requested by the defendant, first special instruction requested by the defendant being as follows:

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At the request of the defendant, the court instructs the jury as follows:

The jury is instructed as a matter of law that if a person has a reasonable cause to believe that another has sought him out for the purpose of killing him or doing him great bodily harm, and that if he is prepared therefor with a deadly weapon, and the latter makes demonstrations manifesting an intention to commence an attack, then the person so threatened is not required to retreat, but he has a right to stand and defend himself, and pursue his adversary (if necessary) until he has secured himself from danger, and if, in so doing, it is necessary, or it appears upon reasonable grounds to be necessary, to kill his antagonist, the killing is excusable on the ground of self defense."

Modified by interlineation ("if necessary") and given.

Interlineation excepted by defendant.—C. F. I., judge.

Interlineation complained of in parenthesis.

And the trial court further erred in modifying said first special requested instruction by interlining the words in parenthesis "if necessary" in said special instruction, and giving the same to the jury, thereby wholly changing the meaning of said requested instruction, and depriving defendant of the legal right to act upon reasonable appearances of danger as viewed from his standpoint, to all of which

action and rulings of the court the defendant duly excepted at the time.

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Endorsed: No. 1210—John T. New, plaintiff in error, vs. The Territory of Oklahoma—Assignments of errors—Filed August 28, 1903—Benj. F. Hegler, clerk supreme court.

III.

The first point of law which we will discuss is raised by the third assignment of error appearing above, and attacks the eighteenth section of the instructions (printed record, p 98) wherein the jury was instructed in effect that the defendant's duty when attacked by deceased was to retreat, if possible, if he could thereby avoid the necessity of killing his assailant.

That charge is as follows, and is erroneously referred to as No. 19 in the assignments, but is really No. 18:

The jury is instructed that if from all the evidence, facts and circumstances in evidence in the case you believe beyond a reasonable doubt that defendant, New, could have withdrawn from the scene of the tragedy with safety and could have gone away

from the scene of action with safety to his life and person, without committing the homicide described in evidence, as a matter of law it was his duty to have done so, and if he did not, and if you further believe from the evidence beyond a reasonable doubt that the homicide was not necessary in a reasonable and necessary defense of life or person or habitation of said New, at the time of said homicide, then your verdict should be guilty of murder.

We attack this charge on two grounds:

First. The defendant being upon his own premises, and where he had a right to be, was not required to retreat, but could stand his ground when attacked, without in any manner impairing his right of self denfense.

Second. The charge completely stripped the defeudant of his right to act upon the appearances of danger, viewed from his standpoint at the time.

The evidence presented two theories, one testified to by the State's witness, Reeves, and the other by the defendant himself. According to Reeves' testimony, he and deceased were driving along the public road when they saw defendant at work on his farm repairing his fence. Reeves says that he knew there had been ill feeling between them, and he expected trouble between Doyle, the deceased, and the defendant. (See testimony of Reeves, pp 51 to 60.) The witness admitted that he himself had had trouble with defendant, and that they had "agreed to disagree" (p 59.)

When the witness and Doyle saw defendant at

his fence witness remarked, "Yonder is John now." Defendant looked up at them the first time and then proceeded with his work. When they got closer, according to this witness, defendant reached down and got his gun and began shooting at deceased. Doyle and witness jumped out of the wagon on the south side and witness ran south and deceased ran east, the defendant pursued deceased shooting at him several times.

The evidence for the prosecution also showed that after defendant had shot deceased once or twice he pursued him into the house of the witness, Trotter, where the deceased fell and defendant shot him again.

According to the testimony of the defendant there had been ill feeling between him and the deceased and Reeves for some time prior to the difficulty; threats made by deceased had been communicated to him. (See p 83) On the day of the homicide he was at work on his own land fixing his fence when he saw Reeves and deceased approaching in a wagon. When they got within a short distance deceased began pulling at his shirt to draw a pistol. Defendant picked up his gun and fired. Deceased jumped out and continued to try to get his pistol from his breast and defendant continued to fire. Deceased began to run, and when he got about one hundred yards from defendant, defendant ceased firing. Deceased began to work at his breast again and defendant shot again, and deceased ran into the house and defendant followed him in and shot him as he sat

behind the door, working at his breast still trying to get a pistol. (pp 84-85.)

Defendant proved by the justice of the peace and the sheriff (see testimony of Hampton, p 72, and Miller, p 73) that on the body of deceased was found a pistol, fastened to his vest with a safety pin, and it required several efforts or jerks to get it out.

Defendant also proved by Mr. Harper (p 73) that witness Reeves stated after the killing that they were all carrying guns for each other.

Also by Mr. Burroughs (pp 76-77) that Reeves told him: "We (Reeves and Doyle) was coming along the road and saw New, and he told Doyle 'yonder is that fellow now and you had better look out,' and Doyle began to get his pistol loose. It was pinned in the inside of his vest, and New went and got his gun and that he jumped and ran like hell, and Doyle kept on trying to get his gun until New shot one of his horses."

Defendant proved threats made by deceased and communicated to him. (See evidence of Tellford, p 78, 86; Harper, p 86; Howell, p 89; Powers, p 90; Ferris, p 91.)

It was admitted that defendant was on his own premises at the time.

With the record in this condition the trial court instructed the jury as shown in the third assignment, which instruction we will not copy again here in full, placing the duty upon defendant to retreat from his own premises at the approach of his adversary, who had threatened his life, in company with one of his open and avowed enemies.

This court condemned just such a charge as this in the case of Beard vs. United States, 158 U. S. 550. In that case Justice Harlan said:

"But the court below committed an error of a more serious character when it told the jury as in effect it did by different forms of expression, that if the deceased could have saved his own life and have avoided the taking of the life of Will Jones by retreating and getting out of the way of the latter as he advanced upon him, the law made it his duty to do so. And if he did not when it was within his power to do so without putting his own life or body in eminent peril, he was guilty of manslaughter.

"The court seemed to think that if the deceased advanced upon the accused in his own dwelling house * * * the case would be one of justifiable homicide. But we cannot argue that the accused was under any greater obligation, when on his own premises, near his dwelling house, to retreat or run away from his assailant than he would have been if attacked in his dwelling house. The accused being where he had a right to be, on his own premises, constituting a part of his residence and home, at the time deceased approached him in a threatening manner, and not having by language or conduct provoked the deceased to assault him, the question for the jury was whether without fleeing from his adversary, he had at the moment he struck deceased reasonable grounds to believe, etc."

The court then discusses the old doctrine of retreating to the wall and shows taht it has been practically abandoned by the courts entirely or so greatly

modified that it can no longer be given with safety to juries, citing from numerous authorities to sustain its position.

We confidently cite the court to that case and to the following authorities in addition, which conclusively show the error in the charge complained of here:

State vs. Hudspeth, 51 S. W. Rep. 488.
People vs. Newsomer, 118 Cal. 263.
Page vs. State, 40 N. E. Rep. 745.
LaRue vs. State, 41 S. W. Rep. 53.
State vs. Sherman, 18 Atlantic Rep. 1040.
State vs. Evans, 33 W. Va. Rep. 417.
Eversole vs. Conner, 26 S. W. Rep. 816.

The trial court in the "Beard" case was more merciful than the court who tried the case at bar, for he branded the man who refused to retreat as guilty of manslaughter only, while the court in this case said he was guilty of no less crime than murder.

We cannot reconcile the charge in this case with the authorities cited, and we decline to multiply the authorities, but submit that this charge, for the reasons stated, is reversible error.

IV.

We have quoted enough from the evidence to show the defendant's theory of the case, and we submit that the second assignment complaining of the failure to charge on manslaughter should also be sustained.

If the defendant told the truth, and he is entitled to have the jury decide that question, then we have a case where Doyle made an attempt to draw his pistol to kill defendant, but failed, and defendant shot in his necessary self defense. Thereafter Doyle having failed of his purpose retreated, and in fact defendant was no longer in danger, but nevertheless he pursued deceased, and while under the influence of fear or anger produced by the attempt upon his life, he slew deceased. Is this murder?

We submit not. In every jurisdiction that we know of the law makes allowances for sudden passion provoked by an adequate cause, it matters not whether it be fear or rage, so long as it is of such a character as renders the mind incapable of cool reflection. In all courts an attempt upon a man's life is held to be an adequate cause to create such passion as will reduce a killing, made under its influence, to manslaughter.

In Stevenson vs. U. S., 162 U. S. 320, it is held to be the bounden duty of the court to submit the issue of manslaughter when there is any evidence to raise the issue. This question is for the jury. As is said by the court in that case (p 320), "The presence or absence of this malice or mental condition marks the boundary which separates the two crimes of murder and manslaughter. As we have already said, there may be a case of killing by shooting where the facts necessarily show malice, but taking all the evidence in this case we thiuk it was one for the jury to determine upon the issue of manslaughter."

Again the court says in the Stevenson case, after discussing the effect upon defendant's mind of deceased's prior conduct, as affecting the grade of homicide. "It seems to us quite plain that an assault upon another by means of firing a pistol at him is naturally calculated to excite some kind of passion in the one upon whom the assault is made. It might be of anger or it might be of terror. If either existed to a sufficient extent to render the mind of a person of ordinary temper incapable of cool reflection it might be plausibly claimed that the act which followed such an assault was not accompanied by the malice necessary to constitute the killing murder. Whether such a state of mind existed, and whether the plaintiff in error fired the shot under the influence of passion without malice cannot properly be regarded as a question of law."

This opinion by the Supreme Court of the United States but announces the law in all jurisdictions.

Nor do we think the law of Oklahoma is different than that laid down in the above decision.

By section 2086 of the statutes of 1893, homicide is made manslaughter in the first degree.

"When perpetrated unnecessarily, either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed."

The learned judge who wrote the opinion of the Supreme Court of Oklahoma in affirming this case quotes the above statute and then reviews the evidence which defendant relies on to show manslaugh-

ter and then concludes that there is no manslaughter in the case, and asks, "Where is the element of unnecessary shooting?" This question indicates that if this element can be found the court's ruling might be different. The learned judge in the latter part of his opinion answers the question himself, for he says: "There is no question but that the fatal shot was the last one fired, when deceased was in the inner room of Trotter's house, where he had retreated from the defendant, and was at the time making no demonstration, nor could he have been making any demonstration - - because he was in an enclosed room, and defendant could not have believed at the time that the deceased was about to or could do him any bodily harm." (See page 126, opinion of the court.

If the facts just quoted are true, is it possible to conceive a case in which the element of unnecessary shooting more clearly exists?

Here then we have a case made by the evidence where the deceased makes an attempt to shoot the defendant. He fails to get his pistol out, and beats a retreat. Defendant then pursues him, under the terror of rage produced by the attempt upon his life, and shoots him while retreating. The deceased runs into a house and falls behind a door and defendant, still under the influence of the passion, as is evidenced by his exclamation to Trotter when the latter tries to stop him, "God damn you, turn me loose!" (see opinion of court, page 123), goes into the room and fires fatal shot. Was not this an unnecessary shooting?

In order to judge defendant from his standpoint when he fired the "fatal" shot, you must take into consideration what has just preceded it and provoked it. You must remember the threats and the attempt to carry them into execution, and then the defendant's condition of mind becomes clear.

We submit that the killing under above circumstances comes clearly within the statute quoted, "When perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed."

The Court of Criminal appeals of Texas in Tollett vs. State, 55 S. W. R., 575, applies the law to just such a state of facts when it says: "If deceased made an attack upon defendant, and such attack, viewed in the light of the previous difficulties and antecedent grudges, and the light of the surroundings at the time of the attack, caused defendant to believe from his standpoint that he was in danger of death or serious bodily harm, and if acting under such reasonable appearance he shot at deceased, and deceased after being shot or shot at, in good faith abandoned the attack, and defendant continued to fire at deceased as he retreated with full knowledge that there was no danger, and at the time his mind had been rendered incapable of cool reflection by the assault and circumstances of the former difficulty (by terror, rage or resentment), or by all such circumstances put together, appellant's mind was incapable of cool reflection, and thereupon he shot and killed deceased,

he would not be guilty of murder, and could not be guilty of any higher grade than manslaughter.

The learned judge who wrote the opinion in the case at bar in discussing this question (page 124 of Record) says, after stating defendant's theory of the facts: "Now, if the act of deceased was sufficient to justify defendant in this belief, in other words, if the act of deceased was such as to make a reasonable man believe he was in imminent danger, then there was sufficient justification for the defendant's act. But where is the element of unnecessary shooting?"

To this we reply that we are not discussing the question of justification, but of "mitigation." The learned judge fails to give the defendant the benefit of his mental condition at the time the "fatal shot" was fired, which was produced by the unlawful attack of deceased upon him, which is the crucial question, as is shown by the court in Stevenson vs. U. S. supra.

V.

The trial court in his instructions to the jury also lost sight of the important question of the condition of defendant's mind at the time the fatal shot was fired, as is apparent from the fourth assignment of error, which we will take up now, as it fits in very snugly at this time. This assignment assails the 15½ section of the instructions, which is as follows:

"The court instructs the jury that if a man kills another through mere cowardice, or under circumstances which are not in the opinion of the jury suf-

ficient to induce a reasonable and well grounded belief of danger to life or of great bodily harm, in the mind of an ordinarily courageous man, the law will not justify the killing on the ground of self defense."

The giving of this charge only made more imperative the giving of a charge on manslaughter. Let us assume that if a man kills another through "mere cowardice" that the law will not "justify" it. Does it follow that such a killing is murder? Will not the law "mitigate" the offense if it is done through mere "cowardice?" If the killing is the result of cowardice merely, where is that express malice necessary to constitute murder?

And yet since no other degree is submitted to the jury than murder, they must necessarily have concluded that if plaintiff in error killed Doyle, while the latter was retreating when he was in no danger, simply because he was afraid, regardless of the condition of his mind or of the cause of it, he was guilty of murder.

That jury had only two alternatives, either an acquittal or murder. They might have believed all defendant swore, and yet not feel disposed to let him go free. Yet, if instructed properly that his fears, if produced by the acts of deceased, could be looked to for the purpose of mitigation, it is very likely that they would have been merciful, but they looked through His Honor's charge, and found no mercy there.

This charge is also erroneous because it leaves it to the opinion of the jury to say if there was any

reasonable appearance of danger sufficient to produce a well grounded belief of danger in the mind of an ordinarily courageous man, instead of judging him from his standpoint as he is, with his fears and apprehensions, acting from his own individual standpoint at the time.

Wharton Criminal Law (9th Edition Sec. 488) discusses fully this question and decides that the true test is not how the situation appears to "a reasonable man," but how did it appear to "the defendant himself." He cites various authorities and quotes (Sec. 490, foot note p 464) as follows. Following Judge King's lead, we find Judge Brewster, afterward presiding in the same court, declaring that "The attack must have been such as in the belief of the prisoner rendered it necessary to defend himself, even to the taking of the life of the deceased."

VI.

We also complain in the sixth assignment of the action of the court in refusing to give the following instruction:

"The jury are instructed as matter of law that if a person believes, and has a reasonable cause to believe, that another has sought him out for the purpose of killing him, or doing him great bodily harm, and that he is prepared therefor with a deadly weapon, and the latter makes demonstrations manifesting an intention to commence an attack, then the person threatened is not required to retreat, but he has a right to stand and defend himself, and pursue

his adversary (if necessary) until he has secured himself from danger, and if in so doing it is necessary, or it appears upon reasonable grounds to be necessary, to kill his antagonist, the killing is excusable on the ground of self defense."

The court modified this by adding "if necessary," as shown in the assignment. The right of defendant when attacked to pursue his assailant until he considers himself out of danger is especially important under the peculiar facts of this case, and it was a very grave error and prejudicial to him to limit his right of pursuit to actual necessity.

From what we have said and from the quotation from the Stevenson case we think it is perfectly clear that the evidence is ample to require the issue of manslaughter to be submitted to the jury. That there was evidence of manslaughter is apparent from the charge of the court itself, for in charge No. 17 (p 98 of record) the learned trial judge groups all the facts which we rely on to constitute manslaughter and tells the jury they constitute murder. This charge is as follows, and if the law takes any notice of the effect upon a man's mind by an attempt to take his life, this charge cannot be the law of Oklahoma or of any other jurisdiction:

"The jury are instructed that although they may believe from the evidence that before defendant, New, fired the first shot at the deceased that the deceased made some demonstration which indicated an intention on his part to draw a gun and that New at that time had reason to believe and did

believe that the deceased was about to draw a gun for the purpose of assaulting the defendant, and that said New at said time believed his life or his personal safety was in imminent danger, yet, if they further believe from the evidence beyond a reasonable doubt that before the fatal shot was fired the deceased had withdrawn from the scene of action, was fleeing from said New, and had retreated to a place of safety, and that said New followed the deceased after the real or apparent danger was over, and without any reasonable belief on the part of said New that his life or personal safety was in imminent danger, said New shot and killed deceased in manner and form as charged in the indictment, then said New is guilty of murder, and the jury should so find."

Yet the honorable and learned judge who wrote the opinion, holding that there was no manslaughter in this case asks "Where is the element of unnecessary killing?"

The above charge simply culls from the case the facts which constitute manslaughter and makes them murder, and declines to submit any other degree of homicide. Who blames the jury for saying it was murder?

When the law refuses to take into consideration the weaknesses that human flesh is heir to; when the law ceases to judge a man from his own standpoint, with his fears and passions aroused, then will a killing under the circumstances detailed in the above charge constitute murder and not before.

The facts grouped in the above charge by the court, which he says would constitute murder, simply make out a case where the homicide was "perpetrated unnecessarily while resisting an attempt by the person killed to commit a crime or after such attempt shall have failed," and which the Oklahoma statute declares to be manslaughter.

If there was any evidence of manslaughter the court should have charged upon it without being requested, as it was part of the law of the case.

Bishop New Criminal Law, Sec. 328.

Trabin vs. Conner, 67 S. W. Rep. 719.

VII.

We also complain of the refusal of the court to give defendant's request to charge as shown by the first assignment, which is as follows:

"You are instructed that if from the evidence you entertain a reasonable doubt as to the cause of the death of the deceased; that is, if you are in doubt as to whether or not he died from the effects of gunshot wounds or from the effects of injuries inflicted by a blow upon the head by some deadly instrument, then it is your duty to acquit the defendant."

The fifth assignment raises practically the same question for the charge of the trial court assumes that the deceased came to his death by being shot with a Winchester rifle and that deceased met his death by shooting. (See fifth assignment p 8 of Rec.) (See charge 15½-16, p 97-98.)

We submit that where it is doubtful whether deceased came to his death by shooting or by some other means, that the indictment should contain two counts so that it may cover either phase. But where, as in this case, the indictment only contains one count, and that charges a death by shooting, then it becomes incumbent upon the prosecution to establish this element as clearly and with the same precision required of it of the other elements. (Indictment page 17 of Record.)

Dr. McClain testified that he could not tell which injury caused the death. (See Record page 49.)

The learned Supreme Court of Oklahoma disposes of this question by saying, "While it is true that this witness (Dr. McClain) stated that he could not tell whether death was caused by the gunshot wound or from the blow on top of the head, yet it does not follow that the jury could not have found from other evidence what caused the death of deceased." (See opinion page 125.)

We respectfully submit that that does not meet our contention. While it is true "the jury may have so found," yet it was not submitted to them at all to find on this question, but the Court settled that question by constantly referring to the "firing of the fatal shot," etc.; "at the time the fatal shot was fired," etc. (See Tr. p 97-98.)

Wharton Criminal Law (9th ed.), Sec. 519-525, treats of this question, and it appears therefrom that when the indictment alleges the instrument that caused death, and it appears that the instrument

pleaded and instrument proved are of different nature and character, the variance is fatal.

Thus he says (Sec. 519): "Thus, evidence of a dagger will support the averment of a knife, though evidence of a knife will not support the averment of a pistol." And again at the close of Sec. 519 he says: "At common law proof of striking with a gun will not sustain the averment of shooting."

If it be said that the proof in this case showed both a shooting and a blow with a gun, either of which was fatal, and that the prosecution in the very nature of things could not state which caused the death, then we say that this situation could have been met by alleging both instruments in two separate counts, and then the two counts should have been submitted to the jury for them to find what was the cause of death. Such course was not pursued, but the judge assumed that the shooting was the cause.

In Wharton (supra) Sec. 525, he says that where the instrument is unknown the indictment should so aver, and in the note he cites the case of Comm vs. Martin, 125 Mass. 394, "where it was held that where the indictment charges defendant in one count with killing by means of a certain weapon and in another count with killing by means and weapons unknown and at the trial the killing is proved beyond a reasonable doubt, and there is no evidence of the particular means of death, the jury may convict on the latter count." And again he says at the end of Sec. 525, "But the instrument must be either specifically

defined or the want of such specification must be excused by the averment that the instrument was unknown."

While it may be true, upon the whole case, that this record fails to show a justifiable killing, yet, taking into consideration all the fact and circumstances, we think it manifest that it has been tried upon a wrong theory. We submit that manslaughter has been mistaken for murder, and defendant is now in the penitentiary under a life sentence, and that justice as well as well settled and established principles of law demands that the judgment of the lower Courts be reversed with instructions to grant defendant a new trial.

Respectfully submitted,

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